would be very expensive to pursue because WestLB has employed competent, aggressive counsel who would undoubtedly vigorously defend the action, and in that regard the litigation would become even more expensive; that the settlement of the lawsuit is in the best interest of creditors because the plan offers unsecured creditors the opportunity to receive 100 cents on the dollar on a deferred payment basis, which is essentially what the unsecured creditors would get if they prevailed on their equitable subordination action. Alternatively, unsecured creditors get 60 cents on the dollar if they so elect on the effective date; that the committee is also advised that a factor to consider is the collectability of any judgment. And while the committee was not particularly concerned that a judgment would be uncollectible, because WestLB is a bank and a substantial German entity, but in addition, that the lawsuit was really only requiring or asking for a reordering of priorities with respect to certain amounts that would already be in the estate. It wasn't requiring the payment of money damages, and it was not requiring the payment of some additional funds by WestLB.

That said, the fraudulent transfer action

could ultimately down the road lead to some money damage recovery, although in the lawsuit that was pending before the Court at this time, the only request was for a return of the fraudulent transfer of releases.

And that given the analysis that the committee has engaged in, the committee has determined that the settlement under the plan whereby the lawsuit is dismissed in exchange for 100 cents on the dollar in deferred payments or 60 percent payment on the effective date, is in the best interest of creditors of the Easy Street Partners estate.

And, your Honor, that would be the end of Mr. Elliot's testimony, and I would now offer him for cross-examination for any party that would like to cross-examine.

THE COURT: Is there any objection to the proffer?

MR. WILSON: No objection to the proffer.

MR. HOFMANN: No objection, your Honor.

THE COURT: The proffer is received.

Is there any desire to cross-examine?

MR. WILSON: No cross-examination, your Honor.

MR. HOFMANN: No, your Honor.

THE COURT: All right.

MR. JENKINS: Thank you, your Honor.

THE COURT: Thanks, Mr. Jenkins.

Mr. Havel.

MR. HAVEL: Thank you, your Honor. I would like to just put into the record several admissions or statements by WestLB as the plan proponent that relate to items that had come up during the course of the process.

First, the operating agreement that was attached to the plan supplement did not contain provisions required under Section 1129, and we will state in open court and we will put in the confirmation order that the operating agreement will be amended to include a prohibition against the issuance of non-voting securities in order to comply with the Section 1129.

We had previously mentioned the fact that -- and the testimony by Mr. Robertson that the actual entity to own the reorganized debtor is currently under consideration. It will be either EAA or WestLB or an affiliate. But in any event, there will be no change of the economic substance of the reorganized debtor that has been presented here for purposes of performing the plan, and structural

changes will only be driven either by other either businesses or tax considerations but in no effort to change the substance of the agreements made under the plan.

Your Honor, on Friday we had arranged to have Mr. Jeff McEntire, who is from Gemstone and was one of the principals identified in the plan supplement, available to address the issue of appropriateness of him as a manager and operator of the property. That had been raised by an objection by Park City I, and on Friday I obtained an agreement that he did not have to be present for the testimony or for that issue. And I just wanted it on the record that he had been here and with the understanding that we had excused him with the understanding of Park City I.

THE COURT: What was his name again?

MR. HAVEL: Jeff McEntire.

MR. HOFMANN: I'm certainly not going to retread anything that Mr. Boley may or may not have said, but I will say that I did not have that agreement.

MR. HAVEL: No, it was with the representative that was here at the time.

MR. HOFMANN: Just to be clear, I was not

a part personally of that agreement and I had not heard that until now. I do not object to it if that was Mr. Boley's agreement, but that is news to me.

MR. HAVEL: Okay.

I believe the last issue, your Honor, is a remaining comment by the creditors committee to the new plan and its potential impact on one aspect of the Class 4 treatment. As noted here, the Class 4 claimants start out with an option of either taking the three-year note or taking the cash discount. The note is generally referred to as option number one and the cash discount is generally referred to as option number two. The committee had raised the prospect that perhaps there should be some opportunity to re-elect options in light of the change of the plan funder from a third party to the bank. We've been discussing the prospects of that kind of an election, and there were some concerns on behalf of the bank that reopening elections could change the economics because we had planned only so much cash on confirmation. We had planned to pay notes through operations. I think we've worked out an agreement, and I'll try to repeat it and ask Mr. Jenkins to confirm if it's accurate. We will allow a certain number of the Class 4 claimants to

consider a change in their option. It will be extended only to those Class 4 claimants who previously accepted the plan. Therefore, those who were only before aware or active enough to have expressed the option. Two, it will only be an option -- or it will only be a choice to convert from option one back down to option two. And three, insiders, if any, who currently are in that group will not be permitted to elect.

And with those understandings, what we would propose is concurrently with the filing of the confirmation order, we would give a notice to that group of Class 4 members and give them 14 days to elect a shift in the treatment. We don't believe that that shift should have any material economic effect in terms of how many people they are and the dollar amount of claims that they hold.

MR. JENKINS: Your Honor, just to complete the loop here, yes, Mr. Havel and I have been engaged in a series of discussions and have agreed that that re-election option as he stated would be appropriate under the circumstances here, particularly the allowance of only those who have affirmatively voted to accept the plan to reconsider their election. The thinking being that those individuals have understood

in their acceptance that they did have an option for option one or two, whereas those who may have rejected the plan, of course, knew by the plain terms of the plan that they were going to be getting option one. In that circumstance, through their rejection of the plan, would not have the opportunity to re-elect. And we do have that list of creditors who did elect option one, and those will be the ones that will be given the re-election notice.

Any further questions, your Honor?

THE COURT: No. Thank you.

MR. HAVEL: One more item, your Honor. I don't believe this is technically a confirmation issue, but I thought to avoid any unanticipated questions or concerns, we would disclose to the Court that there are a couple of procedural matters that the plan did not specify with great detail that we are going to elaborate in the confirmation order. One is going to be setting up a bar date for the administrative claims and perhaps a timetable for fee apps and hearings to occur. We will circulate a form of confirmation order and will let the parties have input on that, but we are not asking today for your Honor to fix an actual date. We will propose it in the confirmation order. At least that is the way we

would propose to proceed unless others want to discuss it further now.

Lastly, we did provide for the assumption of a certain number of executory contracts. We really don't expect any issues over the cures on those amounts because they are small contracts, but we do need a bar date for the non-debtor party to those executory contracts to object if they disagree with the cure amounts. And so we would insert that deadline in the confirmation order as well, probably giving them, you know, 21 or 30 days to object from notice if they disagree with the cure amounts.

Those are the two procedural matters that I wanted to at least alert parties to in case they would have questions as to the substance of those.

THE COURT: All right. Is there any further evidence that any parties wish to present on the confirmation issue?

MR. BLUMENTHAL: The debtor has none.

THE COURT: Mr. Wilson or Mr. Hofmann?

MR. WILSON: We have none, your Honor.

MR. HOFMANN: Nothing beyond what has been introduced.

THE COURT: All right. Legal argument, yes.

MR. HOFMANN: May I be excused for the hearing in my other matter, your Honor?

THE COURT: You may.

MR. HOFMANN: Thank you.

THE COURT: And if you are not back, Mr. Hofmann, we'll take a recess.

MR. HOFMANN: Thank you.

CLOSING ARGUMENT

BY MR. BLUMENTHAL:

First, your Honor, I'd like to thank you for your patience and indulgence in making available the time to complete the hearing this afternoon. I also want to thank you for making me stay over the weekend because I had a pretty enjoyable time in Park City on Saturday and Sunday.

THE COURT: Good.

MR. BLUMENTHAL: Your Honor, as you already know, the Gunther objection was resolved. The committee response quasi objection was resolved. All the classes entitled to vote have been accepted. The modifications to the plan between the last pending joint plan -- last pending plan of the debtor and the joint plan did not materially affect any voting classes. Under 1127(a) there was the right to

modify and 1127(d), the prior votes of the Classes 2, 3 -- 2, 4, and 5, as well as the vote cast by WestLB and Class 1 should not require any re-solicitation.

Class 7 and Class 6, which received nothing under the plan are deemed to reject and will be getting no distribution. I'll address those issues regarding those classes a little bit later.

With regard -- just, you know, sort of in general, the equity, Class 7, I think the evidence is pretty clear that there is no equity beyond the aggregate amount of claims of Easy Street Partners.

As your Honor is aware, the standard of proof in a confirmation hearing is a preponderance of evidence. I think what you have heard over the last two days is that the evidence overwhelmingly supports and satisfies all of the 1129, 1122, and 1123 requirements. In fact, I believe it is the only evidence that is before the Court.

Although our brief in support of confirmation was filed late Thursday night, I'm assuming by now his Honor -- past experience, has probably already read the brief. So I'll try to go very quickly over what I call pro forma-type confirmation issues. 1129(a)(1), which deals with classification in 1122 and 1123, has been satisfied.

All similar claims were classified per class. We submit Class 6 differs legally and factually based upon the subordination agreements. I'll get to that in a little bit when I talk about subordination. Debtor is generally given flexibility in creating separate classes where the holders have different legal interests. I know Mr. Havel is going to address that in some detail later also.

The eight mandatory requirements of 1121 -- 1123(a) 1-8, I believe, have been clearly met by the evidence. That was in pages nine through ten of our brief. If we could just quickly click through those. The plan designated claims and interest in separate classes as well as specifying unimpaired claims and specified classes in Article 3, they specified and treated impaired classes and claims of interest in Article 5. They -- I've already addressed that they provided the same treatment for each claim of interest of a particular class and provided adequate means for implementation of the plan. That is in Article 7 as well as the plan supplement for WestLB funding, which has been next to the plan supplement as an exhibit, as well as the testimony that you have heard from both Duncan Robertson and Mr. Shoaf. It likewise, as Mr. Havel

just announced, the reorganized debtor's bylaws and operating agreement will prohibit the issuance of non-voting equity securities. And finally, contains only provisions consistent with the interest of creditors and public policy. The only evidence before your Honor, I think facially, the plan supports that on its face. The only evidence before you was Mr. Shoaf's testimony relative to those factors.

The 1129(a)(2), there was -- the disclosure statement was approved, as you are aware, overwhelming acceptance. It was, of the voting classes, only one creditor holding a $4,000 claim voted to reject the plan. The plan, 1129(a)(3) was proposed in good faith and not by any means forbidden by law. And the courts, your Honor -- and your Honor should consider the totality of the circumstances and the legitimate purpose of reorganizing.

The only testimony that you have heard and only evidence that you have heard is that it was proposed in good faith. Mr. Shoaf testified the various things that he and DDRC did in trying to solicit from among over 60 people or entities to fund the plan, as well as negotiations of ultimately arriving at the joint plan, the negotiations that

were conducted with WestLB, the committee, Jacobson and the homeowners. And, in fact, the plan protects the interest of 117 homeowners, eliminates their liens. I've lost count of how many general unsecured creditors there are, but there are over 50. WestLB, Jacobson and its subs will be satisfied, and also it addresses additionally the public interest in that the downtown Park City area will be best served by the continuation of one of their premier properties, the Sky Lodge.

All of this points to the absolute good faith that the plan was -- that the -- that the plan was both proposed and is -- and complies with the good faith requirements of the code.

Mr. Wickline's unsubstantiated ramblings in counsel's brief should be totally and absolutely disregarded. He sent his lawyers to this courtroom to try to obfuscate and block a plan when he really has no monetary stake in it and didn't have the courtesy of appearing here to submit any testimony or be subjected to cross-examination, which would have been somewhat painful for him and perhaps the Court in having to spend the time, and it is he who has unclean hands. The cries that the plan is not being proposed in good faith is shallow and there is not

one scintilla of evidence before the Court to controvert the good faith findings that we are going to ask the Court to make when we submit a confirmation order.

1129(a)(4), again everything was supported by the testimony and the exhibits before you. All administrative claims will be paid in full. The (a)(5), we disclosed the necessary information regarding management in both the plan, the testimony, the plan supplement and the exhibits produced before you, your Honor. There are no rate change -- rate changes necessary from any regulatory agency. So, therefore, 1129(a)(6) is inapplicable.

With regard to 1129(a)(7), to the extent that it was necessary to present evidence, I think the testimony of both Mr. Shoaf and Mr. Throndson clearly showed that the best interest test was satisfied because everyone will be getting at least what they would have gotten in liquidation. In fact, the testimony was that in a liquidation, no one would get any money other than WestLB being partially paid.

The -- 1129(a)(8), the -- all impaired voting classes have accepted the plan -- that is Classes 1, 2, 4, and 5 -- as evidenced by the ballot report. Also (8)(10) was satisfied because at least

one impaired class has accepted the plan. And, again, Classes 6 and 7 do not vote. And to the extent they are ever deemed to have a right to vote, they would be crammed down in 1129(b), which I'll get to in a moment.

I already covered that all admin and priority claims are being paid in full. That is 8 and 9, and (a)(11), the plan is feasible.

The various exhibits and testimony from Mr. Shoaf and Mr. Robertson reflect that the four and a half million dollars being contributed by WestLB is sufficient to pay all the creditors as required under the plan. And the testimony, again, uncontroverted, is that the operations of the Sky Lodge post-confirmation -- you recall the five-year pro formas -- would be sufficient to carry out the plans and reorganization would not be necessary.

Again, although there was not testimony, as debtor's counsel, we will make sure that all trustee fees are paid under 1129(a)(12). They are current as we stand here today, and obviously any that become due until there is a final decree will be paid.

Again, 1129(a)(13) which deals with retirement benefits is inapplicable because there are

none. And 1129(a)(14) and (15) dealing with domestic support in individual cases are inapplicable.

That brings me to the 1129(b) cram-down provisions. I already touched upon the fact that under (b)(2) the plan is fair and equitable. This is better known as the absolute priority rule. No junior classes under the plan are retaining or receiving property until all senior classes are paid in full, and none of the senior classes are being paid more than are allowed claim. In fact, they are being paid less.

WestLB is receiving the two notes: The 6.2 million senior note, ten million dollar junior note, Jacobson, of course, is receiving a million three-thirty to satisfy both their claim and the subcontracted claims which aggregate a million seven-fifty, and WestLB is putting in the four and a half million to pay unsecured admin priority claims as well as fund the necessary capital going forward, without which the debtor will run out of money by the end of the summer and need to liquidate. The plan does not discriminate unfairly.

As far as Class 7, there's clearly no equity in the debtor, and to have allowed them to maintain or retain property would have violated the

absolute priority rule, which prohibits them from receiving or retaining any assets. And here the property is being -- the assets are being transferred to a reorganized debtor, which is owned differently than the existing equity security holders.

The aggregate amount of the claims exceed 22 million, and that is before you would even consider the claims of Management Development, which is another two million. So clearly Class 7 equity is way out of the money. And I know the committee is going to argue vis-à-vis the 9019 issues and address that regarding the settlement of the lawsuit. But, frankly, the debtor had released WestLB at the very beginning of the case. Partners no longer -- frankly, maybe never had -- but no longer has a claim against them. And I would note that under the substantial case law that is out there, equity does not have standing to bring fraudulent conveyance actions.

And just as an aside, Easy Street Mez and Easy Street Holding are actually plaintiffs in the lawsuit against Bay North. So if there is a recovery, there needs to be some allocation of the recovery between the reorganized debtor which is stepping into that claim on behalf of Easy Street

Partners but also at Easy Street Mez and Easy Street Holdings. And perhaps our two adversaries who were here today who have disappeared from this case from the outset -- frankly, far beyond that in the past -- would become perhaps more active, perhaps they will supply some funding for the litigation. I doubt it. That is not their style, which is to disappear and then come back and stamp their feet and complain when they don't like what is happening.

And, you know, what has occurred here, particularly with Class 7 and probably the -- well, in a horrendous real estate market and the worst real estate downturn in my life -- and I think I'm probably older than most people involved in this case -- probably all of our lives -- should not stop this plan, which supports the fact that there is no equity.

Moreover, just touching upon the fair equitable issues, you heard -- the only evidence before you is that Mr. Wickline doesn't have one penny invested, did not really participate in Management, earned really no fees through his efforts, and asks the Court to disregard a subordination agreement, which is a pretty standard subordination agreement, executed in virtually every

development loan where management development companies subordinate their claims to a lender. And I think it's clear that WestLB is not, in fact, being paid in full. Their claim is in excess of 17 million. They are accepting notes of 16.2 and may get paid off over time. And, therefore, I would submit Classes 6 and 7 are being treated in accordance with their relative priorities as required under the bankruptcy code. There has been no unfair discrimination, which should be determined on a case-by-case basis. I have heard, and, in fact, there is absolutely no evidence of why -- of any bad faith of WestLB and why the subordination agreement under this particular plan should not be enforced. The legislative history, which is cited at footnote 67 of page 33 of our brief, indicates that bankruptcy courts should recognize prepetition subordination agreements.

Not only is WestLB not receiving payment in full, they are putting in an additional 4.5 million, which further supports the subordination provisions.

And in prior plans -- although there has been some noise about this -- the claims that have developed in Management were, in fact, effectively

subordinated to WestLB because they were not allowed to be paid until four years after the plan, and that was -- the prior plan -- and that was the time period in which hopefully the WestLB claim, allowed claim, would have been paid. And, again, payments were coming from a third-party plan funder. I would also remind the Court as well as Mr. Wickline's counsel that there is an adversary proceeding, which I know your Honor is aware about, against Mr. Wickline on theories of breach of his fiduciary duties. There has been some testimony here today. Frankly, this confirmation hearing should not be the time and place to litigate that -- as well as the fact that not only should he not receive anything but perhaps return the $285,000 that he received under the Faithful Servant Doctrine that exists in most states, including the state of Utah.

The other -- and I'll address them briefly -- objections of Alchemy and PC I, I think, could be addressed fairly simply. I don't think WestLB breached any covenant of good faith. At least there is no evidence of that before you. Your Honor should only listen to the evidence, and at the beginning of this case during opening statement, I asked the Court to remember all of the things that

counsel for Alchemy and Wickline said they were going to prove. There is not one scintilla of evidence of anything that they have alleged in their briefs, which are all without factual support.

The release provisions of the plan, frankly, are pretty standard fare. I think it parrots the code section, and they are really just -- other than the committee release of WestLB, they're exculpations for the actions of the parties that participated in this case in proposing and confirming the plan. So certainly if his Honor, as is required to confirm a case, makes good faith findings, there is no reason that the parties involved in prosecuting this case to a successful conclusion to confirm the plan should not obtain the typical exculpation that, frankly, I've seen in every case that has been confirmed with my involvement, whether I'm standing at the podium as debtor's counsel or as committee counsel or as bank counsel.

Again, the other release is simply the release of the committee lawsuit. I don't believe any of the objections have -- objections even have standing to raise an objection to that. Again, the only evidence before you was the proffer of Mr. Elliott, which clearly satisfies all of the elements

of the 9019 settlement and that should likewise be approved.

I've mentioned many times throughout this case in the last two days, Friday and today, regarding Easy Street Partners' release of WestLB, which occurred at the very outset of this case on notice to everyone. PC I never showed up, never objected. They were on notice. Nor did any of -- Mr. Wickline or his entities. On notice, didn't object. I would submit, in addition to the fact that after investigation, debtor, along with their counsel, didn't feel there was -- were good grounds in pursuing it. I also think that doctrines of laches, waiver, estoppel, apply to their cries that there is something wrong with the release of ESP Partners of WestLB, which has been, in essence, the law of this case for about eight months now.

Just to reiterate, there is no evidence to support Wickline's, Alchemy's objections. He is the one who breached fiduciary duties. There is no evidence of any breach by anyone else. He has unclean hands. Everyone else went forward with this plan in good faith, arm's length, and thus negotiated it open and transparently. Everything was disclosed. Everything was noticed. Everyone had an opportunity

to be heard. Any allocations that they make are conclusionary without any evidence.

I think I've touched upon the subordination agreement. Mr. Havel is going to speak a little bit more to that in a moment. There has been, again, some noise by Wickline about ABG-SL being removed as a manager. That occurred almost a year ago, your Honor. We've not heard anything about it, but the only evidence -- and, again, this Court is constrained to only consider the evidence before it, not statements of counsel. That is not evidence. Under Article 6.3 of the Easy Street Holdings', Subsection A -- Easy Street Holding's operating agreement -- when ABG-SL failed to file tax returns, that in and of itself was cause to remove them. In any event, ABG-SL was removed, and ultimately the managers of this enterprise became Michael Fader, Bill Shoaf, Philo Smith, with a requirement that two votes were necessary in order to take action.

And, again, all of those issues, your Honor, are not plan objection issues. They are not relevant to this case as consideration. Any complaints that the partners have among themselves, what occurred outside this case prior to the bankruptcy, are unaffected by the plan. They can

have the parties suing each other in another court, but that is not appropriate in front of this Court, which is considering the reorganization plan of Easy Street Partners. The plan does not release any such claims. That has been a misnomer asserted by -- in certain of the papers. There's about 48 pages of objections filed by the two objecting creditors, I think most of which is misplaced.

They also complain about a release that WestLB is giving to Cloud 9 Resorts, LLC under the plan. That is a claim for WestLB to release, not Easy Street Partners. Again, that does not give rise to any bad faith or otherwise, particularly in light of the fact that WestLB now gives a completion guarantee, is taking over the property, will, in essence, through an affiliate own the property and they are funding it. And they are entering into an employment agreement with Mr. Shoaf, which, again, the only testimony and evidence before you, was negotiated in good faith at arm's length and actually will -- is a necessary element for the transition of a successful reorganization in order to facilitate the ongoing business at the Sky Lodge. And Mr. Shoaf has agreed, yes, with compensation -- he's worked many years and many days in his life without

compensation. The employment agreement has nothing to do with the past. He and his own independent counsel negotiated the agreement with WestLB, who will pay him. It has absolutely nothing to do whatsoever -- even though there has been innuendo cast about with the subordination of the claims of Management and Development or anything that went on in the past.

Likewise, with regard to what has attempted to have been made of the liquor licenses, you don't sell liquor licenses in Utah. In fact, it's illegal to get money from the sale of liquor licenses. What is happening, and I believe the only testimony and evidence before you, is that in order to facilitate the transition and continued operation of Sky Lodge, there has to be -- without the employment agreement, without Mr. Shoaf being employed by the debtor at closing, under Utah law, the liquor licenses would have to be turned in to the ABC and the Sky Lodge would not be able to sell liquor. And in the state of Utah, it's not too easy to get liquor licenses. So on a transitional basis, not many people would start eating at the restaurant there. Business would be severely impacted. It would likewise impact the continued sales, which we

hope -- and actually, the evidence is that they will start to sell the remaining unsold units, which is part and parcel of paying down the WestLB note and the continued operations at the Sky Lodge.

So there has been no misappropriation. There has been no evidence of misappropriation because legally, you are not allowed to transfer licenses. Now, they introduced one liquor license. There is three -- there are three other liquor licenses. They are in evidence by virtue of being next to various exhibits. And those licenses, there has been no evidence that there was anything improper with those licenses, which will be maintained on an interim basis so that there can be a transition until the reorganized debtor procures licenses from the Utah Alcoholic Beverage Commission.

I'll just raise for the last time that PC I has no standing. The equity security holders have no standing. Your Honor has given them a lot of latitude. However, I don't think any evidence has come out that would change anything I've said or militate against the overwhelming evidence to -- that supports confirmation of this plan as well as all of the other ancillary documents that will be executed in connection with the plan.

Your Honor, during the worst economic downturn of our lifetime, particularly in the real estate hospitality industry, which has been decimated, the Sky Lodge opened in December of 2007, probably -- and everyone says location, location. Well, probably not the best of times to open up a new real estate venture. The testimony was that continuing into 2008, 2009, the real estate market virtually collapsed. Mr. Shoaf has expertly navigated through this environment, literally single-handedly, making getting here today a minor miracle. He has virtually stayed the course and single-handedly looked out for the homeowners, the creditors, approximately 100 employees at the Sky Lodge, all who will keep their jobs, all of the creditors will be paid, and what has happened? All the partners headed to the hills. They fled. They hid. And it's sort of -- it's like when you go into battle, leading someone into war, you look behind you and your troops were just gone. That is basically what happened here. And they didn't resurface until a few days ago, and only -- and two of them resurfaced and really because they are unhappy. Well, being unhappy is not grounds to not confirm a plan. All of their arguments are disingenuous and

shallow. There is absolutely no evidence before you to support any of their objections. WestLB particularly, they've raised a lot regarding the employment agreement. The only evidence is the importance of keeping Mr. Shoaf on board, continue its operations. His presence in the community is very high and respected, and the future success and implementing the plan in large part is based upon his continued participation at the Sky Lodge.

You have two choices today: Disaster or successful reorganization. If this plan is not confirmed, everything crumbles. Within a few months, the Sky Lodge will have to close its doors, tell their employees, "You no longer have a job. Go find another job." No creditors will get paid. You are going to have a hole in downtown Park City -- a pretty hole -- but it will begin to deteriorate and be a blight.

On the other hand, if we confirm this plan, every creditor is going to be paid in full and there are only going to be two unhappy people. One person who doesn't have one penny into this project and probably is going to be required to return some money. That is Mr. Wickline, just in case you didn't know who I was referring to. And another security

holder who, you know, frankly, lost a little bit of money in the context of this overall case. And that is -- you know, when you invest in ventures, sometimes you win, sometimes you lose. They lost money. If they think there are any other lawsuits going on out there, this plan doesn't release any of them. And I would submit the overwhelming evidence supports confirmation of this joint plan, and I respectfully request that his Honor enter an order confirming the same.

THE COURT: Thank you.

Mr. Havel?

CLOSING ARGUMENT

BY MR. HAVEL:

Your Honor -- good afternoon, your Honor. We are going to focus on just a couple specific issues that we think are of particular importance to us. I will address the issue of the treatment of the subordinated claims of Management and Development under Class 6. Ms. Jarvis is going to address some of the remaining objections from Park City I to supplement or clarify our position vis-à-vis those.

Before we start talking about the treatment of Management and Development, we have to

make it clear that our position vis-à-vis the treatment of these claims in the plan and our expecting treatment of these claims in the plan have nothing to do with the management dispute between Mr. Shoaf and Mr. Wickline. They have admitted they both own half of both of those entities. There has been a suggestion that Mr. Wickline does not like what Mr. Shoaf did with some of the entities. That is for them to battle. Mr. Wickline can attempt to sue Mr. Shoaf. He can attempt to make a claim for the value that Mr. Shoaf is getting out of this. But we are not part of that and that is not part of our structure.

Now, back on to the treatment of Class 6. It seems to me, your Honor that we should start by focusing on the language in the subordination agreement, which was admitted as an exhibit. I think it was 12 and 13. At Section 6.1(b) it says, "The borrower shall continue to be liable to the developer for all the fees and charges and indemnifications under the development agreement whether incurred before or after the date."

So that basically says Partners will owe money to Management and Development. This is a three-party agreement where the bank, the debtor, and

either Management or Development are involved. It's on about page -- it's not paginated. But the eighth page in, your Honor, down at the bottom of the page, Subparagraph B, and it's the last sentence. And I read the first clause in the last sentence, which identifies the claim that either Management or Development may have against Partners.

And then it goes on to say, "Provided that any right or remedy of the developer, slash, manager may have to collect such fees, charges, or indemnifications from the borrower or the resort shall be subordinated to the indefeasible payment in full, in cash, of all amounts due to the administrative agent under the loan documents."

That is a specific, unequivocal agreement by Management and Development to not accept a penny on their claims until WestLB has received their entire claim paid in cash, in full on an indefeasible basis. So we start with a very clear contractual term and a very clear provision that we want to enforce through the plan at this point.

It's noted, this is not an unusual type of agreement between a lender and the insiders. This is different in -- not necessarily in nature, but in context where you oftentimes have subordination

agreements between two creditors who are just subordinating themselves because of a priority dispute or something. This is one where the owner, the operator, the developer, the manager says, "I want to borrow some money from you, and I'm not going to take a penny out of this thing until you are paid back in full." That is the promise and it's not an unusual promise for a lender to extract or an insider borrower to provide in connection with the loan going forward.

The comments that I'm going to make as follows, your Honor, relate primarily as responsive to the written objections by Wickline. Curiously, a number of the points in the written objections did not seem to be addressed during the hearing in terms of either evidence that was adduced or lines of questioning. I'm not sure if that means they think these issues have been abandoned or if they felt that they were adequately dealt with, but I'm going to address them because they are in the brief.

Wickline starts their efforts to get out of the effect of the subordination agreement by saying, well, you have to establish the existence and validity of a subordination agreement in order to ask the Court to enforce it. They have put in no

evidence regarding the existence or validity of these subordination agreements. We, your Honor, in turn, have now in Exhibits 10, 11, 12, and 13, the following: We have the articles of formation for Management and Development. We have both of those articles of formation saying that Mr. Shoaf is one of the two managers for these entities, and that he alone has the power to bind the entity. So we have clearly a corporate authority for Mr. Shoaf to sign these. And then we have the actual agreements themselves, which are now Exhibits 12 and 13, which are signed by Mr. Shoaf on behalf of Management and Development.

We submit that this constitutes undisputed and uncontested proof of the existence and the validity of the subordination agreements. If you look at the case which is cited actually both in Wickline's papers and in our reply, the Best Products case, this is sufficient for the Court to treat the subordination agreement as being in effect and fully enforceable. We have, in effect, established a prima facie case that can now be enforced.

Interestingly enough, Mr. Wickline in his papers goes forward and makes a more difficult and confusing argument where he states without any

citations that we should have filed an adversary proceeding or gotten a declaratory judgment to establish that the subordination agreement was in effect. Well, your Honor, that is not the law. It is not in -- not required by the rules. I will cite you to -- I'll refer you to Bankruptcy Rule 7001(8), which as you may recall is the rule that lists what kind of things should be brought by adversary proceedings. And that section says that, "Adversary proceedings are to deal with subordination of claims unless proposed in a plan."

So you have a specific rule that says you do not have to follow an adversary proceeding and that, in fact, you can do it as part of a plan. And interestingly, further, the Best Products case, which was cited by Mr. Wickline, considered this issue as well. And there the bankruptcy judge said that, "The objections, procedural argument that may deal with the contractual subordination only by the context of an adversarial proceeding is simply wrong."

So we have express case authority saying we have established the validity and existence of the claim. The contention we need or should have done more is unsupported by the bankruptcy rules and unsupported by the cases that we have cited.

Now, having an agreement that we can enforce, the reply papers of Mr. Wickline attempts to raise a series of what I will call defenses, various reasons they claim it should not be enforceable in this particular case. Although there are several legal theories that I'm going to discuss in a moment, when you read the brief, there are three factual scenarios that keep getting thrown up as the basis for the defenses. Three legal -- I'm sorry -- three factual scenarios for which Wickline has provided no evidence in the record at all. But I will discuss them briefly because they have put no evidence in, just to make sure that we understand that none of these can support the alleged arguments in the paper in the objections.

First was an argument that WestLB could have and should have paid itself in cash rather than restructuring its prepetition debt and putting in only new money for its equity contribution. When we get to the legal theory of good faith and fair dealing, we will see even more so that this is just not a requirement at all as a legal matter. But as a factual matter, we have put in our declaration in Mr. Robinson's paragraphs 9 and 10, which were not impeached by cross-examination and not even

challenged, that given the restructuring and given the operations of WestLB, it did not have unlimited capital and it did not normally engage in the business of using unlimited capital to pay off its prepetition or its reorganized debt. It not only is something that they didn't do structurally, but it's something that makes logical sense because the treatment of your new equity is a very different situation than what you do about restructuring debt that you already have in the case. And so it makes perfect sense as to why WestLB would not and could not just dip into its pockets and come up with 17 or 18 million dollars for its old debt, as well as throw in four or five million dollars of new money to reorganize this.

The history of this plan negotiation through every other plan funder shows that there was never a cashout of the WestLB claim. This is not a remedy that was available someplace else and WestLB chose not to pay claims because of some perceived advantage over the Management and Development claims. It is a situation that has existed in the economics of this case from the beginning.

And I would just note, your Honor, that it would be rather extraordinary, even as a general

practice in Chapter 11, to find lenders that have notes that are being restructured which make them kind of an involuntary lender tapping into their brand-new capital, basically refinance an old loan rather than just restructuring it the way it was.

The second argument that was being made here was WestLB is being paid in full, so gee, maybe you shouldn't be enforcing the subordination. First, that contention doesn't match the contractual language. The contractual language says we had to get paid in full in cash. And quite frankly, that should stop the investigation of the factual question because as long as we are not getting paid in cash, any argument about the purported value of instruments or equity that we are getting is irrelevant because it doesn't comply with the contractual language.

But nevertheless, your Honor, at paragraphs 3, 4, and 11 of the Robertson declaration, we again put in uncontested evidence that the fact is that WestLB, by the end -- by the time of the confirmation of this plan will have a claim well in excess of 17 million, that it is settling for the 16.2 million so that it's not getting paid in full as a creditor. Further, we see that -- your Honor, the notes that we are getting for the 16.2 are not even

market notes. So these aren't the kind of instruments that a party could turn around and even sell on the open market for 16.2 tomorrow. These are going to take some patience and some time to repay, part because of the pick element and part because of the two-tiered structure of it all as well.

There is a secondary argument here that I think we can dismiss quickly, and that is somehow because WestLB is acquiring the equity, well, then they really have gotten something worth 22 or 24 million and that is clearly paying their claim in full. And I think that improperly blends the steps that WestLB is taking to structure its prepetition debt and what WestLB is doing by investing new money to acquire the new equity. And the fact of the matter is, WestLB is in no different position than any of the other plan funders that the debtor tried to bring to the table here in this case. And that money involves its own set of risks and rewards and returns. And to the extent there is surplus value in this case -- and I would suggest there is not, based on all the numbers we have seen. But if there were any such value, it doesn't belong to WestLB as a prepetition secured creditor. It's being acquired solely because it goes the next step, puts the new

equity in, it becomes an investor, and should be entitled to its return on that investment.

The third factual contention is by far the most absurd, and that is an argument that, well, WestLB could have done better here, but it intentionally took less just to create a shortfall so that we would trigger our rights under the subordination agreement. And, your Honor, I would suggest that one is just entirely counterintuitive. Lenders do not take less on the prospect that they can have then a litigation advantage over someone else down the line. And, your Honor, I think it's particularly noteworthy -- excuse me one moment.

I think it's particularly noteworthy when you listen to this argument to look at the efforts of Wickline to even support this argument, where in pages 18 and 19 of their brief they go into this area and they say, well, we even manipulated the estimated value of the estate. One time a year and a half ago it was worth 40 million, and then, what do you know, at one time it dropped down to high 20's and now it's only worth 16 -- I'm sorry -- only worth 20.6.

They then go on to suggest while the economic climate certainly could justify the steep decline, but this much, it's impossible. It says a

more plausible explanation for the reduced value, other than the simple decrease in property value, is that we are now intentionally undervaluing it so as to justify not paying them in full.

Your Honor, we all know what has been happening in the real estate market, and for a property to drop 30 or 40 or 50 percent of this nature is not really unheard of and it's the reality of this case.

In addition to the idea that the structure doesn't support the idea that there is some conspiracy to manipulate the value, let's look at the process that led to this restructuring. There was an extended series of negotiations over time. These all looked to values that were fairly consistent from the beginning of the negotiations back in December and January and February. The current plan represents a realistic view of the current value by all the parties. We are taking a risk by investing more money and hopefully extracting a value, but the negotiations with the junior creditors have been at arm's length, where Class 4 is taking less, Jacobson and the mechanic's lienholders are taking less. They are all doing this in order to make the plan work. And to suggest that there is some sort of a

conspiracy or manipulation focused solely on the Class 6 claim is just simply not tenable.

Those factual allegations are not put forth in the record at all. There has been no evidence put in by Wickline on any of those bases. We have rebutted all three of those grounds in our declarations with Mr. Robinson.

I will briefly touch on what they say are the legal theories that are supported or for which they invoke these factual findings. The first is they cite a concept of -- a covenant of good faith and fair dealing, and they suggest that WestLB should not have done anything that made it -- made the subordination agreement enforceable against the Management and Development companies. Your Honor, this is a contract governed by New York law. We have given you several cites of New York cases dealing with the good faith and fair dealing concept. It does not add substantive obligations to a contract. In fact, it does not even come into play as long as the parties are operating within the literal language of their contract. Here we have a contract that I started out pointing out to you is absolutely clear, and we are dealing with only the application of the literal language. And that is, until we get paid in

cash in full, they have agreed to accept nothing. There is nothing in that agreement about procedures or standards by which WestLB must seek it's cash payment. There is nothing in there that limits what it can do to restructure its debt going forward. I submit that the doctrine has no application, or if it applies, it doesn't require the conduct that Wickline argues. Because, frankly, we have enough flexibility within the express language to do what we are doing and what we are entitled to do.

There is a second defense which, quite frankly, I think is good faith and fair dealing, and actually it's little harder to recognize as a doctrine that applies. They use the word "mitigation," which I think, because they cite the same factual problems, comes to the same point, and that is we should have done something harder to avoid them suffering a harm under the subordination agreement.

Frankly, I think in this instance, for the same reasons of good faith and fair dealing, the doctrine doesn't apply or has not been satisfied. More importantly, we know that mitigation is a concept that gets involved when there has been a breach and the non-breaching party is dealing with

its damages. That is not where we are here. This is an agreement by its terms we are enforcing the rights to not pay them until we get cash in full. This is not a question of going after them for an affirmative recovery. Quite frankly, if they wanted to not be subordinated, they could come up with the cash and pay us as well. They were the insiders and the managers and they chose not to. So for them to now sit and say because we are stuck with another restructuring that doesn't pay us cash, that we have a duty to mitigate their subordination obligations. It does not fit the doctrine and it does not fit the documents itself.

The third and the fourth defenses are arguing that there was a breach by WestLB of some obligations to Partners and had something to do with funding money out of an account. There has been no evidence that that breach occurred. There has been no evidence that there were damages that arose from that breach.

As a legal matter, however, a breach of contract between WestLB and Partners would not be a basis for excusing them from their subordination agreement. It's -- at worst, it's a claim that Partners has against WestLB for either damages or

reformation of the agreement or some other kind of contractual dispute between the two of them.

We've cited at footnote 71 on page 35 of our reply brief the Walnut Leasing case, which quite extensively and clearly talks about the fact that alleged breaches, alleged fraud conduct, alleged damages to third parties cannot be used as a basis to then reorder priorities that have been established by subordination agreements. And that case rather thoroughly considered efforts by a subordinated creditor to avoid its obligations and said they could not do that by pointing to third-party breaches and disputes.

The fourth defense is the last one. It's under the heading, quote, "Inequitable conduct," discussed at page 23 of the Wickline brief. Interestingly enough, it goes on for about three pages and doesn't mention the word "WestLB" at all. It's Mr. Shoaf appropriates my liquor license rights. And then there is a sentence at the end, and WestLB must have surely been involved in this and so that is a reason to not let them enforce the subordination agreement.

Well, the fact of the matter is, your Honor, as I said in the Walnut Leasing case, some

alleged harm between Mr. Shoaf and the debtor, or alleged harm between Mr. Shoaf and Mr. Wickline, is not going to be the basis for reordering our subordination agreement. And more importantly here, there has been absolutely no evidence that WestLB engaged in an aiding and abetting of some sort of breach or duty. If anything, we have stayed out of that and let the parties resolve that dispute on their own. Therefore, I submit, your Honor, that the subordination agreement is fully effective and that there are no defenses to its enforceability in this case.

The last two issues, and I'll touch on them briefly because I think they are very quickly and easily answered in the case law is, how do we then put them in a separate class and give them nothing?

Classification is pretty straightforward. Section 1122 says you classify claims of a similar nature together, but it also clearly contemplates that you can create more than one class. The Wickline cases against classification are really inapposite. They are cases of sufficiency claims by senior secured lenders and efforts to cram down new value plans. Instead, we cite the cases where you

can clearly classify insider claims, and you can clearly classify subordinated claims in separate classes. The character of the claims are different enough that the courts permit you to justify them. They are not viewed as being a gerrymandering or an improper purpose to put them in a separate class at all.

And, your Honor, I mentioned briefly the Walnut Leasing case a couple of times. But I do, for this purpose, want to point out that Walnut equipment leasing case that I have cited, the judge had a similar question there and he says, "I find it rather obvious that the holders of subordinated debt do not have claims substantially similar to the holders of senior debt. I do not view this to be an 1122 issue and I will focus on treatment, not classification of the claims."

So I think that our classification pretty easily passes muster and is supported by the facts and the numerous cases that have done this.

The last part is the treatment area, your Honor, and here we have Section 510 that says, "Subordination agreements are to be enforceable in bankruptcy."

We have the express language that says,

"Management and Development are to receive nothing until we have received everything in cash in full."

Those two provisions permit you to treat them differently. And in that context, it is not unfair discrimination to give them less than you are giving other people, based on the financial analysis that neither of the senior classes are even getting paid in full. And to give them nothing in that context passes the fair and equitable cram-down test.

Lastly, I want to come to a theme in the paper of Wickline, which is wholly unjustified, and that is a continued beseeching that they be treated more equitably, how unfair it is to have a plan that only gives them nothing and no one else zero, and how they wish people had worried more about a fair treatment of them vis-à-vis others. And I want to point out that this is not a question of inequitable treatment. It's a question of what are the legal rights and what are the respective equities of the parties with the legal rights.

As we pointed out, there is a legal binding contract that they receive nothing in this case. It is not inequitable to ask this Court or the plan to ask people to be bound by their contracts and to perform them. Further, as an insider, they are

not in a particularly sympathetic place. They are not innocent parties who were pulled into this case and now find themselves subordinated. These are people who asked the bank to lend them money to help build this project, and they in turn, quite normally agreed, we are not going to take anything out of this until you are paid in full in cash. As an insider, your Honor, they don't deserve any special equity or consideration. They are not innocent third parties. If anything, they were parties who were in control of the situation and to the extent it doesn't have enough money to pay them in full now, they don't look to anyone else but themselves.

And finally, as to who is going to suffer if the Wickline equity plea comes in, what will happen here if they are not subordinated? Well, they are not going to get 100 cents on the dollar. There is not enough money in this case for that. We have limits on capital and limits on funds. So the equitable result that they want is they get to step into the pot with the Class 4 creditors -- which right now are about 900,000 and they are about two million -- and I guess they want two-thirds of the pot over there. They want to force unsecured creditors that have already agreed to take 60 cents

on the dollar to drop it down to 20 cents on the dollar. There will be no notes for anyone because the percentages won't be that big. I submit, your Honor, that would be the inequity in this case, to impose on those innocent general unsecured creditors that burden when the insiders agreed to subordinate themselves and through this plan should be compelled to comply with that obligation.

I believe Ms. Jarvis will address some of the objections of Park City I. Unless you have any questions, those are my comments, your Honor.

THE COURT: No, thank you, Mr. Havel.

CLOSING ARGUMENT

BY MS. JARVIS:

Your Honor, I'll try to briefly address just a few of the objections that were raised by Park City I on behalf of WestLB. I know this seems like a repeating theme, but I would repeat again, they clearly have no standing. I think the evidence has been clear that they have no economic interest or any reasonable expectation of any impact at all by this plan being confirmed. Because they clearly are not going to -- and even under the original plan -- were not going to receive anything from -- as a result of

this plan being confirmed.

Even if the Court somehow construes that they have standing under 1109, their objections are not persuasive because they are objections for the creditors and the equity holders of this estate to raise, to make themselves, and no such objections have been made. The creditors, in addition, have voted overwhelmingly in favor of the plan, which is supported by the creditors committee as well. Their objections are not persuasive, nor are their arguments they raise, a lack of notice persuasive because Park City I could have no expectation of any distribution -- not under the original plan, not under the amended plan -- and in that sense, there is no change. And that is for four reasons.

The first is, the valuation testimony demonstrates that there was no equity for Partners' own equity holders much less the equity holders two levels above Partners. And that value that -- upon which the no equity -- or no -- yeah, no equity was based was established by an order entered in April -- April 15 of this year. So it's been out there for several months.

Secondly, the committee stipulation was filed on February 9, 2010 and this was before the